

NO. 04-70578

ORIGINAL

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN COOPER,

Petitioner,

v.

JEANNE WOODFORD, Warden,

Respondent.

CAPITAL CASE

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FILED 2/11/04
DOCKETED 2/11/04
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On Application To File Second or Successive Petition For Writ of Habeas Corpus

**MOTION TO STAY MANDATE PENDING'S RESPONDENT'S PETITION FOR
WRIT OF CERTIORARI**

BILL LOCKYER

Attorney General of the State of California

ROBERT R. ANDERSON

Chief Assistant Attorney General

GERALD A. ENGLER

Senior Assistant Attorney General

RONALD S. MATTHIAS

Supervising Deputy Attorney General

DANE R. GILLETTE

Senior Assistant Attorney General

State Bar No. 65925

455 Golden Gate Avenue, Suite 11000

San Francisco, CA 94102-7004

Telephone: (415) 703-5866

Fax: (415) 703-5877

Attorneys for Respondent

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KEVIN COOPER,

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v.

JEANNE WOODFORD, Warden,

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CAPITAL CASE

On Sunday, February 8, 2004, a three-judge panel of the Court denied Cooper permission to file a second or successive habeas corpus petition challenging his 1985 state conviction for murder and sentence of death. On February 9, the Court voted sua sponte to grant rehearing en banc and subsequently held that Cooper could file a successive petition. The Court's mandate is expected to be filed on or after February 17, 8 days after issuance of the en banc panel's order.^{1/}

1. Because respondent is not entitled to seek rehearing of the en banc panel order, 28 U.S.C. § 2244(b)(3)(E), it would appear that FRAP 41(b) governs issuance of the mandate. The mandate would ordinarily issue in 7 days, but February 16 is a legal holiday. FRAP 26(3).

Respondent moves for an order staying mandate pending respondent's anticipated Petition for Writ of Certiorari. *See* FRAP 41(b); Circuit Rule 41-1. Respondent's anticipates filing the petition within the next 90 days. *See* Sup.Ct. R. 13.1.

The showing in support of the motion to stay mandate appears in the attached declaration of Dane R. Gillette, counsel for respondent.

Dated: February 11, 2004

Respectfully submitted,

BILL LOCKYER

Attorney General of the State of California

ROBERT R. ANDERSON

Chief Assistant Attorney General

GERALD A. ENGLER

Senior Assistant Attorney General

RONALD S. MATTHIAS

Supervising Deputy Attorney General

A handwritten signature in black ink, appearing to read 'Dane R. Gillette', with a stylized flourish at the end.

DANE R. GILLETTE

Senior Assistant Attorney General

Attorneys for Respondent

DECLARATION OF DANE R. GILLETTE

DANE R. GILLETTE, declares:

I am a Senior Assistant Attorney General assigned to represent respondent in this habeas corpus action.

In a decision issued on the afternoon of February 9, 2004, about seven and a half hours before Cooper's scheduled execution, the en banc panel held that Cooper satisfied the requirements of 28 U.S.C. § 2244(b) as to at least one issue presented in his proposed successive habeas corpus petition and authorized him to file the petition in the United States District Court for the Southern District of California. That decision was issued less than 24 hours after the three-judge panel denied Cooper's application. The Court voted sua sponte to rehear the application en banc.

Respondent recognizes that we are not entitled to seek certiorari review from the merits of the Court's order authorization of the successive petition, § 2244(b)(3)(E), and we not intend to. That section also precludes a petition for rehearing en banc from the denial of successive petition authorization. Respondent contends the Congressional limitation divests the Court of jurisdiction to rehear, sua sponte, the application en banc.

The Court specifically addressed this issue at the beginning of its order.

Slip op. at 1-2. In support of its authority to act sua sponte the Court cited *Thompson v. Calderon*, 151 F.3d 918, 922 (9th Cir. 1998) (en banc); *In re Byrd*, 269 F.3d 585 (6th Cir. 2001) (en banc); *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997). Of these cases *Thompson* involved sua sponte authority to recall the mandate while *Triestman* involved sua sponte authority of the three-judge panel to reconsider its own decision. Only *Byrd*, which also involved a last-minute attempt to stay the execution of a condemned state inmate, actually dealt with the question of a circuit court's en banc authority to do sua sponte what Congress had expressly precluded it from doing on a party's petition. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (recognizing authority of Congress to enact limits on successive petitions in § 2244(b).) The *Byrd* opinion generated a substantial debate within the court about the propriety of its action. *Compare* 269 F.3d at 588-589 (Jones, J., concurring); *id.* at 591-592 (Cole, J., concurring) *with id.* at 598-600 (Suhreinrich, J., dissenting). Although the Supreme Court denied certiorari, *Bagley v. Byrd*, 534 U.S. 1109 (2002), respondent believes the issue is one that demands further consideration. Indeed, this case more squarely presents the issue than did *Byrd* where there was some suggestion the Court had permitted the filing of an unauthorized rehearing petition. *See id.* at 594-595 (Boggs, J., dissenting). Whether a federal circuit has jurisdiction to sua sponte rehear en banc

the decision of a three-judge panel denying an application to file a successive petition is undoubtedly an important question of nationwide interest warranting resolution by the Supreme Court.

A stay of mandate is necessary to allow respondent to seek orderly review of the Court's decision. The motion is made in good faith and not for the purpose of delay. Respondent's arguments present substantial questions.

Accordingly, it is respectfully requested that the Court grant respondent's motion to stay mandate pursuant to FRAP 41(b) and Circuit Court Rule 41-1.

I declare under penalty of perjury that the foregoing is true and correct as to those matters stated from personal knowledge.

Executed at San Francisco, California, on February 11, 2004.

A handwritten signature in black ink, appearing to read 'Dane R. Gillette', written over a horizontal line.

DANE R. GILLETTE
Senior Assistant Attorney General

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Cooper v. Woodford**

No.: **04-70578**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 11, 2004, I served the attached

MOTION TO STAY MANDATE PENDING RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102-7004, addressed as follows:

DAVID T. ALEXANDER
GEORGE A. YUHAS
LISA MARIE SCHULL
ORRICK, HERRINGTON & SUTCLIFFE, LLP
400 SANSOME STREET
SAN FRANCISCO, CA 94111

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 11, 2004, at San Francisco, California.

PEARL LIM

Declarant



Signature